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15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
16 IN AND FOR THE COUNTY OF YAVAPAI

17 STATE OF ARIZONA,)	No. P1300CR20081339
)	
18 Plaintiff,)	Div. 6
)	
19 vs.)	MOTION TO PRECLUDE LATE
)	DISCLOSED EVIDENCE,
20 STEVEN CARROLL DEMOCKER,)	WITNESSES AND EXHIBITS
)	FROM THE STATE'S 59-62nd
21 Defendant.)	DISCLOSURES
)	
)	
)	(Oral Argument Requested)

22 **MOTION**

23 Steven DeMocker, by and through counsel, hereby respectfully requests that this
24 Court exclude evidence, witnesses and exhibits from the trial in this matter that the State
25 late disclosed to the defense. This motion is based on the Due Process Clause, the
26 Confrontation Clause, the Eighth Amendment and Arizona counterparts, Arizona Rules
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1 of Evidence, Arizona Rules of Criminal Procedure and the following Memorandum of
2 Points and Authorities.

3
4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 A detailed history of the State's disclosure violations has been provided to the
6 Court in prior pleadings and will not be repeated. The disclosure deadline was set by
7 the Court on May 12, 2009, for June 22, 2009. The State has repeatedly ignored this
8 deadline. The State disclosed over 25,000 pages in February, approximately 70,000
9 pages in March and April, nine months after the deadline imposed by the Court, and
10 continues to provide late disclosure, including 46 CDs and close to 600 pages, with less
11 than one week to trial. The State's practice has crippled the defense's ability to prepare
12 for trial, review the disclosure, research and hire its own experts, and prepare to
13 confront the State's evidence in a death penalty case that has been pending for over a
14 year and a half. Trial is now *one week away*.

15 As a sanction for the State's past disclosure violations this Court on April 8,
16 2010 struck the f(2) and (6) aggravators. The case remains a death penalty case with the
17 remaining f(5) aggravator. The Court also excluded some late disclosed emails but did
18 not exclude many other items of late disclosure, including hundreds of pages of late
19 disclosed evidence as well as several late disclosed experts for which the Court found
20 the State had not exercised due diligence and had not offered any good cause for its
21 failure to timely disclose.

22 Rule 15.6 requires that if a party determines that additional disclosure may be
23 forthcoming within 30 days of trial, it is to notify the court and other parties
24 "immediately" of the circumstances and when the disclosure will be available. The
25 State has provided a 15.6 notice. Although the State's notice did not comply with the
26 Rule, this motion does not raise issues with respect the items of evidence described in
27 the State's 15.6 Notice.
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1 Rule 15.7 gives the Court wide discretion in imposing a sanction. The State
2 should not be permitted to thwart the Court's disclosure deadlines until mere weeks
3 before a death penalty trial when the Court made clear in May of 2009 that extensions
4 for disclosure would be granted only where good cause was shown. The permitted
5 sanctions under Rule 15.7 include precluding or limiting the calling of a witness, use of
6 evidence or argument; dismissing a case; granting a continuance or declaring a mistrial;
7 holding counsel in contempt; imposing costs; or other appropriate sanctions. This Court
8 should exclude the late disclosed evidence based on the pattern of conduct evidenced by
9 the State in this case. The State has offered no explanation for its repeated failures to
10 exercise due diligence nor has it proposed any alternative sanction. Given the depth and
11 breadth of the violations at issue and the limited time to trial, in a case where Mr.
12 DeMocker's life is on the line, preclusion is the only appropriate remedy. Counsel also
13 request that the Court dismiss the remaining f(5) aggravator as the State continues to
14 violate its disclosure obligations subsequent to this Court's rulings.

15
16 **1. Interviews and Investigation of Verde Valley Jail (21615-21622, CDs
17 6260-2262, 6281, 6282, 6291 and 99)**

18 On July 7, 2009 the State was advised that Mr. Sears received information from
19 two sources who had communicated about the circumstances surrounding Ms.
20 Kennedy's death; one from within the Verde Valley Jail. Apparently the State chose to
21 ignore this information until a week before trial. Now the State has disclosed interview
22 reports and 7 CDs¹ of interviews related to its eventual investigation. These include an
23 interview of someone the State disclosed to the defense for the first time in its late April
24 9, 2010 witness list. In the late disclosed documents the State provides an incomplete

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26 ¹ The State asserts that this disclosure was made to the defense on April 15. However, the State did not provide
27 the 40 CDs listed in its disclosure statement to the defense on that date. The State provided those CDs to Big
28 Picture and it was not until April 23, 2010 that Big Picture provided these CDs to the defense. The CDs are not
provided with any transcripts so additional time is required to fully review these late disclosures.

1 report of this late disclosed witness's interview. The State will respond, that it has a
2 continuing duty to investigate this case. While that is true, that response does not
3 address the State's lack of diligence to investigate information it had for over 9 months.
4 This information and this witness should be precluded based on Rules 15.6 and 15.7.

5
6 **2. Additional Request for Opinion from Eric Gilkerson and Late
Disclosed Gilkerson Exhibit (21631, 21707-9)**

7 On April 15, 2010 the State disclosed that it has asked its late disclosed expert
8 Eric Gilkerson to opine about new matters, including the tracks alleged to be from Ms.
9 Kennedy's shoes. The State also late disclosed disks that were sent to Mr. Gilkerson
10 including photos "related to the suspects shoes" and a CD of photos of Ms. Kennedy's
11 shoes. The State also sent Mr. Gilkerson Ms. Kennedy's shoes. The State also late
12 disclosed an "exhibit" from Mr. Gilkerson with photos of what are believed to be
13 sample shoes (these shoes were not provided to the defense until April and defense
14 experts have not yet been able to complete their examination and testing) and photos of
15 tracks from the scene. There is no report for this exhibit, it was late disclosed without
16 any 15.6 notice and it is indecipherable given the lack of information disclosed. Mr.
17 Gilkerson's identity and initial report were withheld from the defense for a period of
18 five months while the parties litigated the shoe print impression evidence at the scene.
19 The Court has not previously excluded Mr. Gilkerson's opinions based on late
20 disclosure. However, because Mr. Gilkerson's "exhibit" was late disclosed, without
21 notice and without information to permit the defense to identify or investigate, at a
22 minimum the exhibit should be excluded. The same is true with respect to any new
23 opinions that may be propounded by Mr. Gilkerson. The defense is unable in the one
24 week remaining to trial to examine and test any opinions (which are still not disclosed)
25 or the late disclosed exhibit of Mr. Gilkerson. The State did not perform this testing or
26 disclose this exhibit in time to permit the defense to properly examine and confront this
27

1 evidence. Mr. Gilkerson's new opinion and this exhibit should therefore be excluded
2 pursuant to Rules 15.6 and 15.7.

3 **3. Forensically Enhanced Tire Tracks CD (6285)**

4
5 On April 15, 2010 the State sent 40 CDs to Big Picture. On April 23, these CDs
6 were delivered from Big Picture to Osborn Maledon. With ten calendar days to trial,
7 the State has disclosed a CD labeled, "Photos: Forensically Enhanced Photos of Tire
8 Tracks." These tire tracks have been the subject of evidentiary hearings and litigation
9 resulting in a finding on the appropriateness of a *Willits* instruction. The State has
10 provided no good cause for its failure to identify or disclose this CD until now, no
11 information about how this CD was prepared, when and by whom, or what expertise the
12 preparer has or what methods were used. The State provided no 15.6 notice. The
13 defense has no way to investigate and respond to this late disclosure. With less than
14 two weeks to trial and no idea about who or what this information may be about, this
15 Court should preclude this CD and any testimony about it pursuant to Rules 15.6 and
16 15.7.

17 **4. Mr. DeMocker's Statements (24 CDs)**

18 On April 23, 2010 Big Picture Delivered 23 CDs² of jail visitation calls. None of
19 these recordings are transcribed or summarized. Nor is there any indication that the
20 State intends to use any of these as "statements." The Court ordered the State to
21 identify all statements from February to the present by Tuesday, April 20. The State has
22 not identified any additional statements. The State did disclosed additional CDs of
23 statements, some dating back to January, but did not identify any it intends to use.
24 Furthermore, even if disclosure and not identification was all that was required, the
25 State's did not provide this material to the defense until April 23, well after the date

26
27 ² The State's disclosure log indicated that 24 CDs were included, however counsel only received 23 CDs. Counsel
28 wrote a letter advising the State of the same.

1 ordered by the Court. The Court should preclude admission of any additional
2 statements based on the State's failure to abide this Court's orders.

3
4 **5. Late Disclosed Interviews (CD 6291, 6292 and 6293)**

5 On April 23, 2010 Big Picture delivered 3 CDs of interviews that were conducted
6 by the YCSO in early February. The State should not be permitted to wait until 10 days
7 before trial to disclose interviews that have been in its possession for months. These
8 interviews and any investigation or evidence arising out of these interviews should be
9 precluded. The defense does not have time to investigate and follow up on the
10 mountains of continual late disclosure offered with no excuse or explanation by the
11 State. These should be excluded under Rules 15.6 and 15.7.

12 **6. Sorenson**

13 On April 14 the State emailed the defense approximately 350 pages of printed
14 materials as well as several .fsa files from Sorenson forensics. Much of this information
15 was related to consumptive YSTR testing that the State identified for the Court in a
16 March 18, 2010 Notice. However, Sorenson also consumed items that were not
17 mentioned in the State's March 18, 2010 Notice, for which no defense expert was
18 present and about which the defense was not advised in advance. This is in direct
19 defiance of this Court's orders.

20 In addition, this testing was recommended to the State by DPS on August 1,
21 2008. (Bates 324). DPS advised the State in August 2008, over 20 months ago, that
22 YSTR testing would yield additional information on the very items the State finally
23 asked Sorenson to test. Yet the State did nothing for 20 months. Then suddenly, two
24 and a half weeks before the commencement of a death penalty case that has been
25 pending for a year and a half, the State requested the testing recommended by DPS.

1 This behavior on the part of the State is completely inexcusable in a death penalty case
2 with a trial date that has been set since May of 2009.

3 The test results do not implicate Mr. DeMocker. In fact, during interviews with a
4 Sorenson analyst on April 27, the analyst discovered that she had made a "typo."
5 Contrary to their earlier report, correcting the "typo" now excludes Mr. DeMocker from
6 both the major and minor male profiles found under Ms. Kennedy's left fingernails and
7 now Mr. Knapp cannot be excluded. Sorenson was apparently not asked to make
8 comparisons between the over 50 buccal swabs obtained in this case by DPS and the
9 minor profile under Ms. Kennedy's nails.

10 In other reports Sorenson opines that "no meaningful comparison can be made to
11 Mr. DeMocker." This language is extremely misleading because it does not address why
12 no meaningful comparison can be made and may mislead and confuse the jury about
13 whether or not Mr. DeMocker's DNA might be present. The report suggests that the
14 absence of meaningful comparison is specific to Mr. DeMocker when it is not.

15 The fact that the State waited 20 months to perform testing it could have and
16 should have performed in August of 2008 with absolutely no excuse for its failure and
17 the further fact that these results are misleading and more prejudicial than probative
18 should lead the Court to preclude this evidence.

19
20 **7. Evidence Related to DR10-014516**

21 On April 20, 2010 the State disclosed reports and 2 CDs relating to a search
22 "from Royal Armstrong" performed on April 17, 2010.³ The defense has no idea why
23 this information was disclosed or how it relates in any way to this case. It was disclosed
24 without a report or any details about its relation to this case.

25
26 ³ These CDs are listed in the State's 61st Supplemental Disclosure as having gone to Big Picture on April 20.
27 However the defense has not seen these CDs and Big Picture indicates they do not have them. The defense has not
28 seen these CDs.

1 **8. DPS Computer Forensics Report (23471-23490 and CD)**

2 On April 20, 2010 the State sent to Big Picture a CD "Court Presentation
3 Material" from Steve Page.⁴ On that same date the State disclosed yet another late
4 disclosed forensic report from Detective Page. Detective Page should not be permitted
5 to testify about this late disclosed report or to testify about this late, not-yet-disclosed
6 CD. No Rule 15.6 disclosure was made with respect to Detective Page, he is not
7 qualified to offer any expert opinions on computer forensics, and the information is
8 more prejudicial than probative under Rule 403.

9 The report details six items located on Mr. DeMocker's computer (evidence item
10 411). There are several Google searches listed about which the State is not able to say
11 whether or not Mr. DeMocker ever visited any of the search results, how long the search
12 page was viewed, when the searches were performed, or who performed the search. For
13 all but two of the Google searches, the State has no information about when these
14 searches were performed. There are no dates associated with the searches. These
15 searches are all taken out of context. None of these searches relate to the way Carol
16 Kennedy was actually killed. The report eliminates any mention of the Writing World
17 sites that were viewed within minutes of these searches. For these reasons, the
18 information in this report is more prejudicial than probative and should be excluded
19 under Rule 403.⁵

20 Furthermore, the State has still failed to disclose the EnCase case file which
21 would permit Mr. DeMocker's experts to review the State's examinations, all late
22 disclosed and not begun for months after they were seized. The defense has been
23 requesting this file for months. Detective Page acknowledged during a defense
24 interview that file exists contains critical information not available anywhere else in the
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26 ⁴ Big Picture apparently misplaced this CD and it was delivered to counsel on April 26, 2010.

27 ⁵ Counsel anticipate a comprehensive motion to preclude Detective Page's testimony and reports pending receipt
28 of a transcript of the partial defense interview conducted on April 27, 2010.

1 case file. It is critical to computer forensic examination, and it has been withheld from
2 the defense. Without these files, Mr. DeMocker's experts are not able to perform the
3 necessary review of the State's analysis. Testimony relating to these searches and this
4 late disclosed report should be excluded based on the State's repeated violations of
5 Rules 15.6 and 15.7 related to computer forensic evidence. Furthermore, all of these
6 searches are more prejudicial than probative and should be excluded under Rule 403.
7

8 **9. Cell Tower Information (23491-25081)**

9 On April 21, the State late disclosed over 1,500 pages of disclosure of cell tower
10 information to the defense. The defense had been requesting cell tower data from the
11 State since November of 2008. The State denied it had non-disclosed cell tower data but
12 then late disclosed additional data. Since that time, the State has late disclosed two cell
13 tower experts. Now, with less than two weeks to trial, the State has late disclosed cell
14 tower data. The defense has no idea what this data means. It is not accompanied by any
15 report or description. The State did not file any 15.6 notice as required under the
16 Arizona Rules of Criminal Procedure. The defense does not have time to review and
17 investigate these records or their meaning in the time remaining to trial. These records
18 should be excluded pursuant to Rules 15.6 and 15.7.

19 **10. Bank Records for Carol Kennedy (25083-25097)**

20 On April 21 the State late disclosed FISTSERV records of rollover transactions
21 for Carol Kennedy. Again, the State was aware of this bank account in January of 2009.
22 The State did not provide any 15.6 notice and did not explain why due diligence would
23 not have led to the disclosure of this evidence earlier than two weeks to trial. These
24 documents should be precluded under Rules 15.6 and 15.7.
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1 **11. Jail Calls from May of 2009 (25098-25125)**

2 The Court ordered the State to disclose jail calls it intends to rely on that were
3 made before December 2009. The State was to identify what statements it intended to
4 use at trial by February 6, 2010. The State did not identify any calls on that date but did
5 provide a supplement (17805-17892) that it later identified as its list of jail calls it
6 intended to rely upon at trial. On April 21, 2010 the State has disclosed transcripts of
7 two jail calls from May 3, 2009. The State has not previously identified these
8 transcripts as those it intends to rely upon at trial as required by this Court's orders. The
9 Court has previously held that non-disclosed statements cannot be relied upon by the
10 State at trial.

11 **12. Sorenson Request (25154-25157)**

12 On April 21, 2010 the State disclosed a Sorenson Lab case submission form
13 indicating it has sent still additional evidence items to Sorenson. Among these items is
14 a note found in Ms. Kennedy's trash, evidence item 518. This item was located in July
15 of 2008. The State provides no rationale for its failure to send this item to Sorenson
16 prior to two weeks before trial, where the State has had the item since July of 2008.

17 The Court should exclude the above described evidence, exhibits and witnesses
18 based on its late disclosure. The evidence was known to the State for months, and in
19 some cases well over a year, before it was disclosed to the defense. The State failed to
20 exercise due diligence to request and disclose the evidence to the defense. The State has
21 not offered any good cause for its failure to exercise due diligence. The late disclosure
22 has prejudiced the defense's ability to prepare for trial and confront the evidence, as
23 outlined above and in prior motions. The evidence should therefore be excluded
24 pursuant to Rules 15.6 and 15.7.
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1 Defendant Steven DeMocker, by and through counsel, hereby requests that this
2 Court prohibit the State from offering late disclosed evidence, experts and opinions as
3 described above.

4 DATED this 29th day of April, 2010.

6 By:



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15 **ORIGINAL** of the foregoing sent via
16 Federal Express for filing this 29th day
17 of April, 2010, to:

18 Jeanne Hicks
19 Clerk of the Court
20 Yavapai County Superior Court
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21 **COPIES** of the foregoing sent via e-mail
22 transmission this 29th day of April, 2010, to:

23 The Hon. Thomas B. Lindberg
24 Judge of the Superior Court
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